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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 601

C. W. H. BANGS, TRUSTEE OF MORRIS FOGEL, BANKRUPT,
Petitioner,

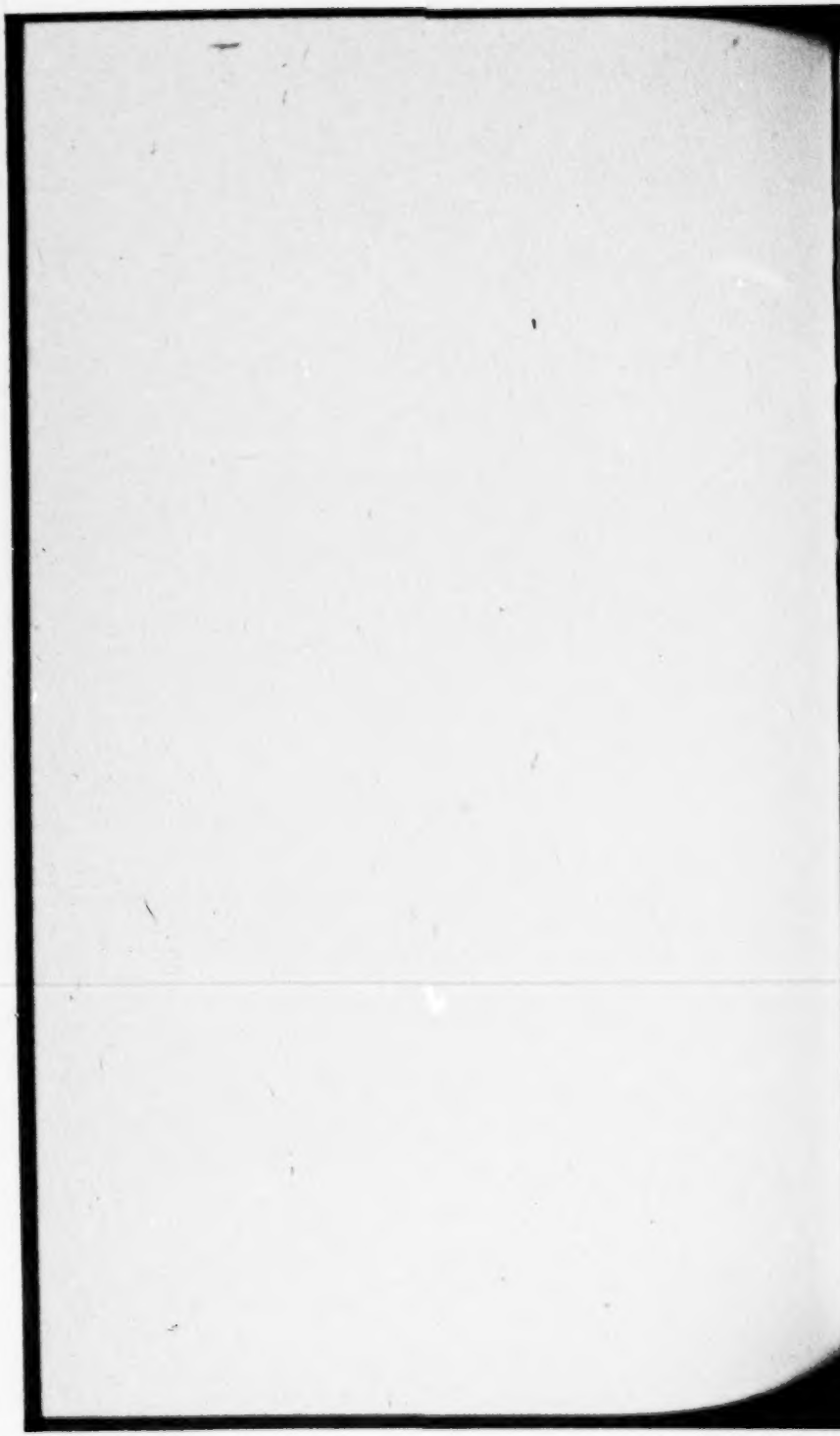
vs.

MORRIS FOGEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

U. S. LESH,
Huntington, Ind.,
Attorney for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS. SEVENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Petitioner, C. W. H. Bangs, Trustee for Morris Fogel, Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause, in which the petitioner herein was the appellee and the respondent herein was the appellant in said Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals reversing the District Court was rendered on November 7, 1947 (R. 57), and appellee's (petitioner's herein) petition for rehearing was overruled on December 3, 1947 (R. 77).

STATEMENT OF THE MATTER INVOLVED.

The respondent Morris Fogel filed his voluntary petition in bankruptcy in the District Court for the Northern District of Indiana on December 7, 1944 (R. 1) without therein listing the insurance policies or the proceeds thereof in controversy.

These were two policies issued by the Metropolitan Life Insurance Company of New York, each in the amount of $1,000.00. Each was a 13-year endowment policy, one to mature on February 6, 1945, and the other February 6, 1947. Each policy states that the Metropolitan Life Insurance Company "Hereby Insures the Life of Morris Fogel, herein called the Insured, being the Father of the Child named herein" and promises to pay "One Thousand Dollars (herein called the maturity amount) upon the surrender of this Policy, to the Insured if the Insured and Sam Fogel Son (herein called the Child) be living on the 6th day of February, 1947 (herein called the Maturity Date)." The policy provides that if the insured die during the lifetime of the child and prior to February 6, 1947 (the maturity date), the insurer will issue a supplementary contract containing certain provisions, among others that the child if living on the maturity date will be paid the face value of the policy, but that if the child die prior to such maturity date the insurer will pay to the estate of such child a sum which, with compound interest at 3½% per annum, would amount, at the maturity date, to the maturity amount. The policy also provides that if the child die during the lifetime of the insured and prior to the maturity date, the company shall be liable only to return to the insured the amount received by it as premiums, together with certain interest thereon

(R. 16). In the application for the policy it appears that the insured was 51 years old and the child eight years (R. 26).

The only contested issue is whether, under the Bankruptcy Act and the Indiana statutory provisions, these policies passed to the Trustee as a part of his estate for the benefit of creditors or are exempt from their claims. It is conceded by the Trustee that the question turns upon a construction of the Indiana statute, which reads as follows:

> "Any person whose life is insured by any life insurance company may name as his payee or beneficiary any person or persons, natural or artificial, with or without an insurable interest, or his estate. Such designation at the option of the insured may be made either revocable or irrevocable, and the option elected shall be set out in and shall be made a part of the application for the certificate or policy of insurance. When the right of revocation has been reserved, the person whose life is insured, subject to any existing assignment of the policy, may at any time designate a new payee or beneficiary, with or without reserving the right of revocation, by filing written notice thereof at the home office of the corporation, accompanied by the policy for suitable endorsement thereon.
>
> "Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his wife and children, or of either, or other relative or relatives dependent upon such person or any creditor or creditors as he may cause to be appointed and provided in the policy.
>
> "All policies of life insurance upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to the wife or children, or any relative dependent upon such person, or any creditor, shall be held, subject to change of beneficiary from time to time, if desired, for the benefit of such wife or children, or

other relative or creditor, free and clear from all claims of the creditors of such insured person; and the proceeds or avails of all such life insurance shall be exempt from all liabilities from any debt or debts of such insured person." (8 Burns Indiana Statutes, Sec. 39-4210.)

On a turnover petition of the Trustee the Referee ruled that the policies in question were not exempt and ordered the bankrupt to deliver them to the Trustee (R. 11). On petition for review by the District Court the ruling of the Referee was sustained (R. 39). On the appeal taken by the bankrupt to the Circuit Court of Appeals that court (by divided opinion) reversed, holding that under the provisions of the Indiana Statute the policies were exempt from the claims of creditors. The opinion was handed down on November 7, 1947. The Trustee timely filed a petition for rehearing, which was overruled on December 3, 1947.

JURISDICTIONAL STATEMENT.

Under the provisions of Rule 38 of the Rules of the Supreme Court it is within its competent jurisdiction to grant certiorari and review the decision of the Circuit Court of Appeals where, as here, such decision is in conflict with that of another Circuit Court of Appeals on the same matter. And, where, as here, the decision is erroneous on an important question involving the administration of the national bankruptcy laws.

THE QUESTION PRESENTED.

The question presented is whether under the statutory provisions as above stated the short term policies wherein the insured, if living at the maturity dates, is named as beneficiary, are exempt from the claims of creditors. The one policy matured and was paid to the bankrupt ($1,056.29) February 14, 1945 (R. 11), and each had a large cash surrender value or loan value when the bankrupt filed his petition (R. 22).

REASONS WHY THE WRIT SHOULD BE GRANTED.

In erroneously holding that under the provisions of the Indiana insurance statute here involved, the policies in controversy and the proceeds thereof are exempt from creditors, the Circuit Court of Appeals misapplied the case of *Holden* v. *Stratton,* 198 U. S. 202, and created a conflict between its decision and that of the Circuit Court of Appeals for the Sixth Circuit in the case of *Moskowitz* v. *Davis,* 68 F. 2d 818, 819, which involved the construction of an identical statute. The decision is on a question of importance in bankruptcy proceedings and other proceedings involving the conflicting claims of creditors and debtors.

See also:

In Re Loveland, 192 Fed. 1005.
In Re Herr, 182 Fed. 716.

(In the majority opinion of the Circuit Court of Appeals the court questions the propriety of counsel for the peti-

tioner Trustee in having cited those decisions of the District Courts as pointing to the distinctions between statutes, such as the one here involved, and the Washington statute under construction in the *Holden* case. That no reflection on this court was intended by the District Courts in pointing to the distinctions, or by counsel in calling attention to these opinions, seems too obvious to call for explanation. Had the Circuit Court taken into consideration the entire section of the statute under construction it perhaps would have withheld that criticism. Nor was the petitioner to blame for this oversight, for it was the respondent and not the petitioner who made the incomplete statement of the statute in his brief in the Circuit Court.)

The writ should be granted for the further reason that the question involved is of great importance, not merely as relating to the parties of record, but to others whose rights may be determined under the rules laid down; and it opens the door to taking advantage of creditors by making it easy to defeat their claims.

Petitioner annexes hereto a brief in support of this petition.

WHEREFORE, it is respectfully submitted that this petition should be granted.

U. S. LESH,
Attorney for the Petitioner.

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MORRIS FOGEL,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF COURT BELOW.

The majority and dissenting opinions of the Court of Appeals are found in the Record, pages 57-66. The decision is reported in 164 F. 2d 214.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is invoked under Rule 38 of the Rules of this Court and section 240 (a) of the Judicial Code (28 U. S. C. 347).

Judgment was entered by the Circuit Court of Appeals in this case November 7, 1947 (R. 67), and petition for rehearing was denied December 3, 1947 (R. 77).

STATEMENT OF THE CASE.

A statement of the case has already been made in the preceding petition, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in holding that under the Indiana statute the policies in controversy or the proceeds thereof were exempt from the claims of creditors.

ARGUMENT.

The opinions—majority and dissenting—of the Court of Appeals is in the transcript (R. 57).

It will be noted that in stating the Indiana statute under construction, no mention is made of the provision which immediately precedes the part quoted:

> "That any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his wife and children, or of either, or other relative or relatives dependent upon such person or any creditor or creditors as he may cause to be appointed and provided in the policy."

This section of the statute is found in Acts of 1935, page 691, Sec. 155; 8 Burns Indiana Statutes, Sec. 39-4210. It is carried in the petition for certiorari.

It also will be noted that the decision of the Court of Appeals mainly rests on the decision of the Supreme Court in *Holden* v. *Stratton*, 198 U. S. 202. Quoting from the opinion in the instant case (R. 61):

> "The Trustee's effort to distinguish the Stratton case is not convincing. It is pointed out that in that case the primary beneficiary was insured's wife, while in the instant case the primary beneficiary was the insured. This is a distinction without a difference."

But in the opinion in the *Holden* case, the distinction between the Washington statute there under construction and other statutes similar to the one here under consideration, is thus pointed out (p. 207):

> "The law of the state of Washington upon which the bankrupt relied to sustain the exemption of the policies

was originally enacted in 1895 * * * and was re-enacted in 1897. * * * The original act provided 'that the proceeds or avails of all life insurance shall be exempt from all liability for any debt' and the amendment of 1897 enlarged this act by making it also applicable to accident insurance."

Further quoting from the opinion (p. 210):

"It is not to be doubted that the broad terms of the statute, as ordinarily understood, embraces both of the policies, and it would not be construction, but legislation, to restrict the meaning of the statute in accord with the narrower legislation in other states, because, in the judgment of the court, it might be deemed equitable to do so."

As stated in the opinion of the court in the instant case, "The State of Ohio has the identical exemption as that of the State of Indiana". Reference is made to the decisions of the Circuit Court of Appeals for the Sixth Circuit (Ohio) in construction of the Ohio statute, in *In re Weik*, 2 F. 2d. 647, and *Moskowitz* v. *Davis*, 68 F. 2d. 818. It is said that in *In re Weik* opinion supports the view taken and the decision in the *Moskowitz* case lends no support to the Trustee's claim. This view of the Court of Appeals seemingly arises out of the failure to take into consideration the entire statute, as previously pointed out, and perhaps some faulty analysis of the opinions in those cases.

In *In Re Weik*, 2 F. 2d. 647 (1924) the distinction between the policies there under consideration and those here involved appears in the first statement of the opinion (p. 648):

"The sole question presented in this proceeding is whether two policies of insurance on the life of the bankrupt whose *wife* is named as beneficiary passed to the Trustee or are exempt from the claims of creditors under the Statutes of Ohio." (Our italics.)

There it was claimed by the trustee that because the policies had some cash surrender value, and contained provisions allowing the insured to change the beneficiaries, the statute should not apply. But the court took the view that there would be no presumption that the insured would displace his wife as beneficiary, and the prolonged period before maturity, twenty years, made them more than mere investment contracts. The Court's reasoning is reflected from this statement in the opinion (p. 649):

> "If such change in beneficiary is made to some person not named in this statute, then, of course, the policy would no longer be exempt from claims of creditors."

In the later case, *Moskowitz* v. *Davis*, 68 F. 2d. 818 (1934), the same court (Sixth Circuit) was again called upon to construe the Ohio statute. There it appeared that the insured, if living at the maturity date, was named as the beneficiary. In holding that the statute did not apply, the court used this language (p. 819):

> "Section 9394 does not deal with life insurance generally, but is limited to life insurance policies upon the *life of any person which have or shall be taken out for the benefit of his wife, children, dependent relatives, or creditors*, and we do not think that the contract in question falls within its terms." (Court's italics.)

In *Hoffman* v. *Welland*, 29 N. E. 2d. 33 (1940), the Ohio Court of Appeals was called upon to construe the statute in a case where the insured's wife had been named as beneficiary but by operation of law—divorce—she had ceased to be his wife; and the court held that thereupon the policy no longer was exempt from the claim of creditors.

In its opinion the court says (p. 60):

> "It is to be noted that the statute does not require that a policy be for the sole benefit of a child and neither does it exclude a policy which is for the benefit of the insured. Obviously, the policies in question were for

the benefit of the bankrupt, but it seems equally obvious that they were also for the benefit of his sons. Certainly it is plain that the policies created an interest both for the father and the sons. The Trustee makes much of the contention that the insured was the primary beneficiary and that at most the sons were only contingent beneficiaries. Even so, this does not negative the idea that the policies were for the benefit of the latter."

This statement reflects the failure of the court to take into consideration all the provisions of the section of the statute under construction, as under well settled rules is required, in arriving at the legislative intent.

As not infrequently happens, we believe that the dissenting opinion expresses a better statement of the rules applicable. As pointed out in the concluding paragraphs (R. 65):

"It seems to me that neither policy can properly be said to be for the benefit of the son. Many contingencies lie in the latter's path before he can become entitled to the face value of the policy: the insured must die before the maturity date, without having surrendered the policy or taken advantage of the provisions for a paid-up policy or assigned it or taken the cash surrender value; he, the child, must live until the maturity date of the policy. I approve the language of the Loveland case: 'The statute is obviously intended to secure the result of preserving the benefit of the policy to her (the wife) or her children, independently of the insured or his representatives. If the provision for payment to her is not adapted to secure this result, it can hardly be such a provision as the statute contemplates.' The policy in question does not seem reasonably adapted to give anything to the child; in all probability he will receive no direct benefit. Surely the legislature must have intended to exempt only those directly benefited.

I would affirm the judgment."

CONCLUSION.

It thus appears that the decision of the Seventh Circuit in the present case is plainly in conflict with the decisions of the Sixth Circuit, the Ohio Court of Appeals, and both the letter and the spirit of the statute. To permit an exemption in such cases is to promote fraud. The language of the court in *In re Powers*, 115 F. 2d. 69, 73 (1940), would be applicable:

> "Such a construction transforms the exemption statute into a device by which the bankrupt may cover up his assets and retain a competence for life while his creditors get nothing."

In the dissenting opinion in the instant case other cases are cited and reviewed, showing that the majority opinion is contrary to the rules as declared and followed by other courts, state and Federal.

Respectfully submitted,

U. S. LESH,
Attorney for Petitioner.